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No. 80-1457

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

ROBERT L. HARDIN - - - - Petitioner

versus

PITNEY-BOWES, INCORPORATED - Respondent

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

REPLY BRIEF OF PETITIONER

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ROBERT L. HARDIN - - - - *Petitioner*

v.

PITNEY-BOWES, INCORPORATED - - *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONER

The Petitioner wishes to reply to the Respondent's Brief in Opposition to the Petition for Writ of Certiorari as follows:

COUNTERSTATEMENT TO RESPONDENT'S STATEMENT OF THE CASE

The Respondent misstated that only two of nine Pitney-Bowes employees discharged from the Louisville office during the relevant time period were over the age of 40.

In their Motion for Summary Judgment before the District Court, the Respondent stated that five (all under 40) of the nine referred to in their Brief in Opposition, "quit" and none of these five were involved in the "low sale volume problem", they having quit for

personal reasons. Therefore, the relevant ratio for this court's consideration is the two of four persons terminated for low sales volume who were over 40 years of age.

This becomes important to the Petitioner's position in light of the statistics set out in his Counterstatement to the Respondent's Argument hereinafter.

In addition to the two persons over 40 years of age who were terminated for low sale volume, one Mr. Bethel Murray, who was 58 years of age, was placed on leave of absence for alleged low sales volume.

The Petitioner also showed the District Court by way of his deposition that three persons under 40, who had low sales volume, they being, Jerry Horine, Ron Perigo and Danny Horine, were not terminated as a result thereof, but were given ample time to improve their performance.

In summary, the Louisville office for the Respondent was reduced by five people for alleged "low sale volume", three of which were over 40 years of age and two of which were under 40 years of age, and three people under 40 years of age were retained in spite of their low sales volume.

COUNTERSTATEMENT TO RESPONDENT'S ARGUMENT

Contrary to the statements made by the Respondent in their brief in Opposition to the Petition for Writ of Certiorari, the Petitioner did offer evidence that the business reason articulated by the Respond-

ent, Pitney-Bowes, for the termination was actually a pretext.

The Petitioner responded to the Motion for Summary Judgment by presenting to the District Court a summation of the Respondent's Answers to Interrogatories, which clearly demonstrated that the Respondent's termination and hiring practices had reduced the Louisville work force from 39% over 40 years of age on December 31, 1971 to 23% over 40 years of age on December 31, 1976 (see Appendix).

The Response to the Motion for Summary Judgment (see Appendix) was in fact an attempt on the part of the Petitioner to comply with the requirements of Rule 56 (Fed. R. Civ. P. 56(e)) in that the Petitioner brought to the attention of the court the statistical information obtained by Petitioner as a result of the interrogatories propounded to the Respondent. The Petitioner did not therefore rest upon the mere allegations or denials of his pleading, but showed by such response that there was a genuine issue of a material fact—which precluded the District Court from granting a summary judgment for the employer.

The Response to the Motion for Summary Judgment (see Appendix) further showed to the District Court that the Respondent's termination and hiring practices were materially affecting the work force of Pitney-Bowes nationwide for persons over 40 years of age by reducing the number of persons over 40 years of age from 47% of the work force in 1971 to 29% in 1976.

The Petitioner has carried forward his burden in accordance with Texas Department of Community Affairs v. Burdine, 49 U.S.L.W. 4214 (March 4, 1981) by showing with statistical evidence that the work force of the Respondent who were over 40 years of age was being materially affected by the termination and hiring practices of the Respondent.

In Bishop v. Jelleff Associates, 398 F. Supp. 579 (D.D.C. 1974) the court held, that where business judgment exceeds permissible limits and reduction in force predominantly of older employees for no apparent rational reason other than age occurs, the spirit of the Age Discrimination in Employment Act (29 U.S.C. §621, *et seq.*) has been violated.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the final order and opinion of the Sixth Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

No. C-760435 L(B)

ROBERT L. HARDIN - - - - - - - *Plaintiff*

v.

PITNEY-BOWES INCORPORATED - - - - *Defendant*

RESPONSE TO MOTION FOR SUMMARY JUDGMENT

May it please the Court:

Discrimination in any manner and more particularly, age discrimination, is not normally found in some blatant act of the employers, but, most likely will be found in a systematic approach of eliminating persons protected under the law within some company policy, which has at its alleged purpose, a sound business goal.

Whether such company policy or purpose violates the law as to discrimination must be ascertained by its total effect upon the work force.

STATEMENT OF FACTS

The Plaintiff was not a newly hired salesman. He had been employed by the Defendant for over eight (8) years at the time of his termination. Through 1974 he had apparently performed his tasks in accordance with company policy.

In addition thereto, in March of 1975, he was awarded recognition as being the top salesman in the Louisville Dis-

tract (Hardin deposition, page 53, question 264). Even in spite of being the top salesman in the Louisville District for March of 1975, Mr. Moon had a discussion with the Plaintiff on April 15, 1975 and gave him a warning because of his low cumulative sales volume for 1975 to date, that being the months of January, February and March.

At that time, the Plaintiff discussed with Mr. Moon the reason for the low sales volume in January and February, that being a sizeable chargeback. It was discussed at that time that the chargeback resulted from poor service by Pitney-Bowes Service Department and was not a result of poor sales performance by the Plaintiff (Hardin's deposition, page 55, question 271). In that discussion with Mr. Moon, the Plaintiff related to him that he had exhausted his territory and due to the economics of the country at that time, and more particularly, in the type of equipment being sold by the Plaintiff, that he was in a low sales volume situation. Apparently, Mr. Moon dismissed these explanations by the Plaintiff without justification. Mr. Moon had only recently been assigned to the Louisville Sales Office and was not in a position to so readily dismiss the explanation of an employee, who was both experienced with his territory and his product, without some investigation. (Hardin deposition, pages 56 and 57).

The Plaintiff does not attempt to allege that his sales volume was up to the standard as set by Mr. Moon. His position though is that Mr. Moon and Pitney-Bowes did not take into consideration the fact that the Plaintiff's sales territory had been exhausted for the particular product being sold by the Plaintiff and of the general economic nature of the country at this time. The Plaintiff alleges that Mr. Moon and Pitney-Bowes did in fact use these factors as the excuse for terminating the Plaintiff because he was over 40 years of age. Other employees who did not attain the sales volume goals were retained

and they were under 40 years of age, they being Jerry Horine, Ron Perigo and Danny Horine. (Hardin deposition, page 62).

In order to ascertain whether the effect of Pitney-Bowes' policy to terminate employees because of sales volume quotas was administered in a non-discriminatory manner, it is necessary that one looks to the total work force and the age thereof to ascertain the effect of these terminations. In response to the Interrogatories propounded by the Plaintiff to the Defendant, and more specifically, to Interrogatory 1, the Defendant submits information which is summarized as follows:

Average Age of Employees at Louisville Office and Percent of Work Force Over 40

Year Ending	Avg. Age	% Over 40
12/31/71	37.04	39%
12/31/72	37.54	38%
12/31/73	38.07	37%
12/31/74	37.80	37%
12/31/75	35.95	25%
12/31/76	34.62	23%

As can be seen from the above facts, on December 31, 1971 there was 39% of the work force at the Louisville office who were over 40 years of age. On December 31, 1976 there was 23% of the work force over 40 years of age. It should also be noted that from December 31, 1974 thru December 31, 1975, that the percent of the work force over 40 dropped from 37% to 25%, being the time period involved in the termination of the Plaintiff. In other words, the impact of the company policy to terminate employees because of alleged low sales volume, netted a reduction in the work force of persons over 40 of 12%.

You are particularly directed to the Defendant's Memorandum in support of their Motion for Summary Judgment on page 4 immediately above the paragraph designated as "argument" whereby "of the four (4) who were terminated for low sales volume, two (2) were under 40, two were over 40." Therefore, 50% of the persons terminated for low sales volume were over 40 years of age. The Defendant also fails to include therein one Bethel Murray, who was required to take a leave of absence in August of 1975 and was later transferred to the Birmingham office. Had not Bethel Murray taken leave of absence, it is the Plaintiff's contention that he also would have been terminated from the Louisville District Office. (Hardin deposition, page 62).

The Defendant alleges that the reason for the Plaintiff's termination was low volume of sales. If such were the case, then and in that event, it would be reasonable to anticipate that the replacement of employees at the Louisville District Office would include persons who were over 40 years of age at the same rate as the persons terminated which was 50% as admitted by the Defendant. In response to Interrogatory 4 propounded by the Plaintiff to the Defendant, the Defendant submitted information which is summarized as follows:

Average Age of New-Hires at Louisville Office

Year	Average Age	% Over 40
1972	33.00	0%
1973	26.00	0%
1974	25.00	0%
1975	26.80	0%
1976	29.36	7%

As can be seen by the above facts, there were no new-hires by the company in the Louisville office for the years

1972 thru 1975 who were over 40 years of age. In 1976 apparently there was one employee hired who was 42 years of age, which accounts for the 7% of the new hires during 1976. But, even at that, 7% is far below the 23% of the average age of the work force over 40 at the same time as was shown by the previous schedule hereinabove presented.

Apparently the alarming statistics as hereinabove presented for the Louisville office was in fact not an isolated situation of eliminating employees over 40 while hiring employees under 40 to replace and expand the work force. The same evidence on a Company-wide basis indicates the same results. In response to the Interrogatories propounded by the Plaintiff to the Defendant, a massive amount of facts were presented which are in effect, filed in Court, but, which have been retained by the Defendant in the office of its counsel at this time. The computer runs indicated that there are seven (7) general areas of division of the sales force of Pitney-Bowes. The information given in response to the Interrogatories is summarized as follows by these districts as to the percent of the work force over 40:

Percent of Work Force By Region Over 40

	Central	Eastern	Gr. Lakes	Mid-Western	North Eastern	South	Western	Total
1971	38%	46%	46%	43%	53%	47%	52%	47%
1972	35%	43%	39%	39%	51%	46%	49%	44%
1973	33%	37%	32%	34%	45%	44%	41%	39%
1974	32%	39%	32%	33%	41%	40%	39%	36%
1975	30%	36%	32%	34%	37%	38%	40%	35%
1976	21%	31%	22%	29%	34%	33%	33%	29%

As is shown by their response to the Interrogatories, there appears to be a systematic reduction of the percent of the work force over 40 years of age since 1971 thru 1976.

This may be classified as the "big picture" which would indicate that the Defendant's Manager, Mr. Moon, was in effect, merely carrying out the overall company policy of reducing the number of employees in the work force who are over 40 years of age.

Again, one must look to the method of hiring people to ascertain whether the company, as a whole, was hiring persons over 40 during this period of time. In response to the Plaintiff's Interrogatories, again, the Defendant presented a massive amount of computer printouts concerning this matter and which is summarized as follows:

Percent of New-Hires By Region Over 40

	Central	Eastern	Gr. Lakes	Mid-Western	North Eastern	South	Western	Total
1972	19%	13%	15%	22%	32%	9%	25%	19%
1973	16%	18%	9%	13%	20%	23%	25%	18%
1974	18%	11%	19%	18%	19%	12%	20%	17%
1975	10%	24%	16%	15%	8%	10%	23%	15%
1976	6%	11%	7%	8%	9%	12%	13%	9%

Again, in reviewing the statistics presented by the Defendant, it is clear that the percent of new-hires over 40 shows a continual reduction for the period of 1972 thru 1976.

The effect of these statistics are that on December 31, 1971, 47% of the sales work force was over 40 years of age and on December 31, 1976, the percent of the sales work force over 40 was 29%. The statistics also show that in 1972, of the persons hired by Pitney-Bowes, 19% were over 40 years of age and in 1976 only 9% of its new-hires were over 40 years of age.

ARGUMENT

The record in this case shows that the Plaintiff had worked for the Defendant for a period of 8 years apparently without any problem. That in January of 1975 and February of 1975, the Plaintiff's sales volume was not up to the Defendant's standard. One of the reasons that it was not up to the standard was chargebacks to the Plaintiff's account due to poor service on the part of the Service Department of the Defendant of which this Plaintiff was not a part thereof. In addition to that, the Plaintiff indicated to the Defendant that he had exhausted his territory as to the Defendant's product which was being sold by the Plaintiff, and that the economic conditions of the country at that time were not favorable to the particular product that the Plaintiff was required to sell in his territory. In spite of these factors, the Plaintiff did, in the month of March, 1975, receive the award by the company as the top salesman in the Louisville District. Therefore, after 8 years, the Defendant decided to base the Plaintiff's entire work career with its company on two (2) months' activity, that being January and February of 1975, even though there was an explanation therefor. Again, in spite of receiving the top salesman award in the Louisville District for March of 1975 the Defendant did, in April, warn the Plaintiff as to his cumulative sales volume for 1975. Again, in April and May of 1975 the Plaintiff's sales volume was low based upon the exhaustion of the territory and the economic condition of the country. In June and July of 1975 the Plaintiff's sales volume went up and in fact, approaching the standard of $7,200.00 in July of 1975. In spite of the efforts on the part of the Plaintiff, the Defendant ascertained that the Plaintiff should be terminated, which occurred in July of 1975. Therefore,

an 8½ year career was brought to an end with the Defendant on only the performance of several months' activity.

By their own admission, 50% of the persons terminated for low sales volume were over 40 years of age and it is the Plaintiff's argument that Mr. Murray was, in fact, terminated from the Louisville Office for the same reason, which indicates that of the five (5) terminations for low sales volume, three (3) were over 40 years of age, which represents 60% of the men terminated for low sales volume.

The Plaintiff's position is supported by the statistics as presented by the Defendant in response to the Interrogatories which shows that the Louisville office was systematically reducing the percent of the employees over 40 years of age and did in fact in the period 1975, eliminate 12% of the work force over 40 years of age. The Plaintiff further supports his position in connection with the Louisville office by showing that there were no new-hires over 40 years of age from 1972 thru 1975 and only 7% of the new-hires were over 40 years of age in 1976.

The Plaintiff further supports his position in connection with his termination being due to age by showing to the Court the statistics associated with the entire company which also shows a systematic reduction of the percent of the work force over 40 and a systematic method of hiring persons under 40.

In summary, the record demonstrates very potently that the Defendant did in fact discriminate in its application of standard sales volume per salesman against persons over 40 years of age.

CONCLUSION

The Plaintiff submits that there is a genuine issue of a material fact to be adjudicated in that he is entitled to present the facts, as set out herein, to the Court for it to ascertain whether such facts indicate that the Defendant did, in the application of its standard of performance, discriminate against persons over 40 years of age and particularly did discriminate against this Plaintiff due to his age.

Respectfully submitted,
Riggs, Walton & Morrison

(s) George E. Riggs, Jr.
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this Response to Defendant's Motion for Summary Judgment and the Order tendered herewith was mailed to Edgar A. Zingman, Sheryl G. Snyder and Thomas H. Meeker, Attorneys at Law at Wyatt, Grafton & Sloss, 2800 Citizens Plaza, Louisville, Kentucky 40202, by depositing same in the U. S. Post Office, postage prepaid on this 14th day of July, 1978.

(s) George E. Riggs, Jr.